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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 834

THE STATE OF NEW JERSEY and the PRINCIPAL KEEPER OF THE STATE PRISON AT TRENTON, NEW JERSEY,

Petitioners,

vs.

UNITED STATES OF AMERICA, *ex rel.* ANTHONY RUSSO and UNITED STATES OF AMERICA, *ex rel.* FRANK BISIGNANO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, ANTHONY RUSSO, IN OPPOSITION AND CROSS-PETITION BY ANTHONY RUSSO FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RAYMOND A. BROWN,
IRVING I. VOGELMAN,
26 Journal Square,
Jersey City New Jersey 07306

Attorneys for Respondent and Cross-Petitioner, Anthony Russo.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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BRIEF FOR RESPONDENT, RUSSO, IN OPPOSITION

Opinions Below

The opinions of the United States Court of Appeals for the Third Circuit, printed in the Appendix, Pet. App. 1 to 30 are reported in 351 F. 2d 429 (3 Cir., 1965).

Jurisdiction

The United States Court of Appeals for the Third Circuit entered judgment in this case on May 20, 1965. The State of New Jersey filed a petition for rehearing, which petition was denied on October 13, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Whether a confession elicited from a defendant prior to indictment, when he has been in police custody for eight days and the focus has shifted from a general inquiry into an unsolved crime to an accusatory process and was not advised of his right to counsel or his right to remain silent, is rendered constitutionally inadmissible against him in a State criminal trial?

Constitutional Provisions and Rules Involved

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Rules of Criminal Practice

Rule 3:2-3. Proceedings before the Magistrate

(a) Appearance. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith.

(b) Preliminary Hearing. The magistrate shall inform the defendant of the complaint against him and if a copy of the complaint has not previously been furnished to the defendant, he shall be supplied with a copy thereof. The magistrate shall also inform the defendant of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. If

the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waivers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket.

(c) Preliminary Examination. If the defendant does not waive indictment and trial by jury but does waive preliminary examination, the magistrate shall forthwith bind him over to await final determination of the cause. If the defendant does not waive examination, the magistrate shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him. If, from the evidence, it appears to the magistrate that there is probable cause to believe that an offense has been committed and the defendant has committed it, the magistrate shall forthwith bind him over to await final determination of the cause; otherwise, the magistrate shall discharge him; provided, however, that a magistrate shall not discharge the defendant without first giving the county prosecutor notice and an opportunity to be heard. Such notice may be oral, or may be in writing, and shall state when the county prosecutor may appear and be heard. An entry shall be made on the docket as to when and how such notice was given. The magistrate shall admit the defendant bail as provided by these rules. After concluding the proceeding the magistrate shall transmit, forthwith, to the county prosecutor all papers in the cause in the event the defendant is not discharged; provided, however, that when the county prosecutor so requests the magistrate shall forward the papers to him even though the defendant is discharged. Any bail taken by him shall be transmitted to the county clerk.

Statement of the Case

The record shows that on March 15, 1961, respondent, Anthony Russo, together with two co-defendants attempted to hold up a tavern in Newark, New Jersey. A police officer, victim of the abortive attempt, was off duty and in the tavern at the time. Russo and another defendant, Bisignano, entered the tavern while LaPierre remained outside in a car that had been stolen earlier that evening.

There was testimony that the gun Russo was carrying in his pants pocket became exposed to view when he opened his coat in the tavern and that some movement on his part with respect to the gun precipitated a struggle between Russo and the police officer and in the course of the struggle, there was an exchange of shots between Russo and the officer which resulted in the death of the officer and the wounding of Russo in his right arm.

Russo was apprehended in the evening of March 15, 1961 and admitted to the Martland Medical Center, Newark, New Jersey. After emergency treatment was rendered to Russo, he was questioned for a short time by four members of the Newark Police Department at some time generally between the hours of 1:45 A.M. and 2:45 A.M. (R 1137, 1171, 1176, 1182), but he refused to admit complicity in the crime.

Russo also refused to permit an operation for the removal of the bullet from his arm. Because the pain from the bullet became excruciating, Russo submitted to an operation on March 17, 1961. He was accompanied to the operating room by a police officer. Upon his return from the operating room two police officers visited Russo and questioned him concerning the incident of March 15, 1961. The two officers told Russo that the co-defendants, La-

Pierre and Bisignano, had made statements to the police, and also one Veronica, and they discussed parts of the statements with Russo.

After the operation, Russo was detained at the hospital until March 24, 1961 at which time he was released from the hospital in the custody of the police. It is undisputed that during Russo's entire detention in the hospital, he was under constant police guard. While detained at the hospital, he was shackled to the bed. During the eight day period at the hospital, Russo was interrogated at different intervals by the police officers. The Prosecutor of Essex County also visited Russo at the hospital on March 17, 1961 (R 1198).

After his release from the hospital, he was immediately taken by police officers to the Newark Police Headquarters for interrogation on March 24, 1961. Lieutenant Kinney testified that he saw the defendant on March 24, 1961 between 12:00 P.M. and 1:00 P.M. and that he had certain conversations with the defendant. On cross-examination, Lt. Kinney admitted that he made no representation to Russo as to his right of advice of counsel before he spoke (R 1161). According to the police testimony, the taking of the written statement began about 1:00 P.M. and was completed about 4:05 P.M.

Russo was not arraigned on March 24, 1961 but was detained at police headquarters from that date to March 28, 1961, where he was taken before a Magistrate. However, on March 28, 1961, Russo's hearing was postponed until April 4, 1961. No explanation appears in the record as to the reason for the postponement. On March 30, 1961, the Grand Jury of Essex County, New Jersey returned an indictment for murder against the defendant. No preliminary hearing was granted to the defendant.

On the limited issue of the voluntariness of the confession, Russo testified he was taken, handcuffed, to the hospital in the early morning of March 16, 1961 in a patrol wagon. When he entered the hospital, a policeman hit him in the stomach (R 1186). He was examined, x-rayed and taken to the first floor of the hospital where he was visited by several police officers. They questioned him, grabbing him, then he got a "shot in the face" (R 1188). On March 17, 1961 he was interrogated by the Prosecutor of Essex County, New Jersey.

After the operation of March 17, 1961, he was questioned by two police officers who wanted him to give them a statement, but he refused. Russo claimed that they abused him and tortured his arm. Ultimately, he was taken to the police headquarters on March 24, 1961 with his arm in a sling. When he arrived at the police headquarters, the sling was taken off. While at police headquarters Russo described the treatment given him by Sgt. Buerle and the threat that if he did not sign the written statement the police would take the typewriter and smash it on his arm. Russo also testified that his arm was giving him considerable pain; that he was being mistreated by Lt. Kinney and that Det. Richards threatened to throw coffee at him. Russo claimed that he eventually signed the statement because he was in pain and by that time he would have signed anything (R 1194).

At the trial in the Essex County Court, Law Division, held at Newark, New Jersey there was psychiatric testimony to the effect that Russo was "within the lower reaches of the average range of intelligence." There was evidence that Russo was "markedly deficient with respect to his capacity for verbal abstraction, the capacity to think abstractly, and the capacity to evaluate external reality

with any validity, with any substance, with any genuine understanding of what is going on around him * * * that his social judgment and perceptual alertness were massively impaired with respect to what the norm might be." The record also shows that at the time of the incident, Russo was twenty-one years old and awaiting sentence for armed robbery.

The Essex County Jury returned a verdict of guilty of first degree murder without any recommendation for mercy, which is the death penalty in the State of New Jersey. On appeal to the Supreme Court of New Jersey, Russo's conviction was affirmed. See *State* v. *LaPierre*, 39 N. J. 156 (1963).

Thereafter, Russo filed a petition for Habeas Corpus Relief in the United States District Court for the District of New Jersey. On the return day of the Writ of Habeas Corpus before the United States District Court, additional testimony was taken relating to Russo. Jean Wiener, a supervising nurse at Martland Medical Center testified that on March 16, 1961 she observed the defendant and his right arm had been shot. She recalled that Russo was yelling as she walked down the hall "I didn't do it, I didn't do it." On March 17, 1961 at 3:00 A.M. she again saw Russo and his face looked swollen. She said, "what happened to your face", and he replied, "they beat me". She also stated that a Mrs. Hall, another nurse, had difficulty in administering nursing care to Russo because of a manacle on his leg, which was corroborated by Juanita Hall. There was also testimony by Dr. John F. Donato that on March 21, 1961, he saw evidence of welts on the arm of Anthony Russo. In his opinion, the results were due to an allergic reaction either to penicillin or parazyme. On cross-examination, he testified that he could not tell

with any degree of medical certainty whether the welts came from allergy or trauma and that his initial conclusion that it was a result of a penicillin reaction he would have to assume certain facts which he did not know, and which were not before him.

The United States District Court made affirmative findings that at no time prior to the signing of his confession did the police inform Russo that he had a right to remain silent; that he had a right to counsel; and that anything he said could be used against him. It further appears that not until April 4, 1961 was Russo informed of his rights. These findings of the United States District Court were affirmed by the United States Court of Appeals (Pet. App. 6a).

The United States District Court denied the Writ of Habeas Corpus. Russo thereafter filed an appeal from the denial of Habeas Corpus Relief with the United States Court of Appeals for the Third Circuit. On May 20, 1965, that Court reversed the judgment of the United States District Court for the District of New Jersey and granted Russo a petition of Habeas Corpus.

Thereafter, the State of New Jersey filed a petition for rehearing in the United States Court of Appeals for the Third Circuit which petition was denied in an Order filed on October 13, 1965.

ARGUMENT

The decision below is clearly correct.

1. Petitioner admits that *Escobedo* v. *Illinois*, 378 U. S. 478 (1964) was surely a logical follow up to *Massiah* v. *United States*, 377 U. S. 201 (1964), (Petitioner's Brief,

p. 14) but attempts to limit the application of this constitutional rule to the particular facts. The Petitioners also find fault with the reasoning of the Court below when it said "The effect of *Gideon* has been to expand the right to counsel and there has also been a widening of the concept of stage or stages when that right attaches. We conclude that it is now the law that the right to counsel is present at every critical stage of the proceedings."

In *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) this Court discarded the "fundamental fairness" test of *Betts* v. *Brady*, 316 U. S. 455 (1942), and held that the right to Court appointed counsel in State trials was guaranteed by the Fourteenth Amendment's due process clause. Prior to the decision of *Gideon* this Court in *Hamilton* v. *Alabama*, 362 U. S. 52, 54-55 (1961) held that since the arraignment "may affect the whole trial" it was a critical stage at which the defendant had a right to the assistance of counsel without regard to "whether prejudice resulted". The *Hamilton* holding was extended in *White* v. *Maryland*, 373 U. S. 59 (1963) where this Court held that the preliminary hearing in *Maryland* was a "critical stage" at which the defendant had a right to counsel unqualified by judicial analysis of the degree of prejudice.

Thereafter in 1964, this Court in *Massiah* v. *United States*, 377 U. S. 201 held that in the post-indictment stage any statement elicited by the police in absence of counsel is inadmissible. The *Massiah* decision was given further expression in *McLeod* v. *Ohio*, 381 U. S. 356 (1965), when this Court applied the rule of *Massiah* to a post-indictment interrogation where counsel had been neither retained nor requested.

Significantly, it should be noted that the New Jersey Supreme Court in *State* v. *Blanchard*, 44 N. J. 195 (1965)

refused to give full recognition to the principal enunciated in *Massiah* v. *United States.* However, the New Jersey Supreme Court was compelled to reverse its position in *State* v. *Green,* —— N. J. ——, decided on December 23, 1965 and now holds that "In the light of *McLeod* we must now interpret *Massiah* as holding that after a defendant is indicted, any statement elicited by the police in the absence of counsel is inadmissible even where the statement is voluntarily given.

In *Escobedo* v. *Illinois,* 378 U. S. 478, 492 (1964) this Court held that the right of counsel attaches when the process shifts from the investigatory to the accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here the accused must be permitted to consult with his lawyer. The confession obtained by the police in *Escobedo* was held inadmissible because it was obtained in violation of defendant's right to the assistance of counsel under the Sixth Amendment as made obligatory upon the States by the Fourteenth Amendment. The effect of *Escobedo* is to extend the "critical stage" of *Hamilton* v. *Alabama, supra,* forward into the pre-indictment investigation, to the point at which "the process shifts from the investigatory to the accusatory". Mr. Justice Goldberg noted that the interrogation of *Escobedo* was "surely as critical as was the arraignment in *Hamilton.* . . . Thus, a characteristic of the "critical stage" is the accrual of an unqualified right of counsel. *Escobedo* holds that the absence of counsel after the right has accrued is itself a violation of a constitutional right and a justification for reversal of any subsequent conviction.

At the time Russo's confession was obtained, the focus had shifted from the investigatory to the accusatory. At the time Russo confessed, the police had the confessions

of the two co-defendants. Additionally, as to Russo, the police were in possession of a liquor bottle and its carton, both of which contained Russo's fingerprints. Russo's general description was given to the police by eye witnesses and he had been identified as possibly being one of the hold-up men. The finding by the Court below that the focus had shifted from the investigatory to the accusatory is amply supported by the record.

Petitioner in its attempt to restrict *Escobedo* to the facts of that case, finds fault with the Circuit Court's conclusion, "We perceive no sound basis for holding that a request for counsel is a pre-requisite for the right to counsel at the interrogation stage while not at any other". We submit that this conclusion is eminently correct even though there is a factual distinction between the *Escobedo* case and this case, namely the request for counsel. That *Danny Escobedo* prior to his arrest had retained counsel while Russo was unable to retain one does not delimit the applicability of the *Escobedo* decision to this case. Decisions of this Court have made it abundantly clear that the right to counsel does not depend upon a request, *Carnley* v. *Cochran,* 369 U. S. 506 (1962); *McLeod* v. *Ohio,* 381 U. S. 356 (1965), and that a waiver of constitutional dimensions is not to be presumed but requires an intentional relinquishment or abandonment of a known right or privilege *Johnson* v. *Zerbst,* 304 U. S. 458, 464.

As the Court below correctly stated, the test of waiver is the same, or should be, no matter what stage of the proceedings is at issue so long as the right has attached. *Escobedo* recognizes this principle, "The accused may, of course, intelligently and knowingly waive his privilege against self incrimination and his right to counsel either at the pretrial stage or at the trial. But no knowing and

intelligent waiver of any constitutional right can be said to have occurred under the circumstances of this case." 378 U. S. at 490.

Escobedo had previously consulted with his attorney and apparently was acquainted with his constitutional right to remain silent and his right to counsel. Yet, this Court held at the very moment he was confronted with incriminatory statements, he was entitled to the "guiding hand of counsel". *Escobedo* was charged with homicide; Russo was also charged with homicide. Russo was under constant surveillance by the police for eight days while in the hospital. Russo was ultimately assigned counsel. To provide special protection for those who can afford counsel as opposed to those who cannot, would smack of a denial of equal protection. See *Douglas* v. *California*, 372 U. S. 352; *Griffin* v. *Illinois*, 351 U. S. 12. The view advocated here is well expressed by the Supreme Court of California in *People* v. *Dorado*, 42 Cal. Rpt. 169, 178, 398 P. (2) 361, 369, 370, cert. den. 381 U. S. 937: "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it."

It is interesting to note that the Supreme Court of New Jersey rigidly adheres to the factual pattern of *Escobedo* and holds that in the absence of a specific request for counsel, *Escobedo* is inapplicable. Recently, in December, 1965, in *State* v. *Green*, that court held that the failure of the

police in the post-indictment stage to advise the defendant of his right to obtain legal assistance and that if he were indigent, counsel would be assigned, was not a waiver of his constitutional right of the assistance of an attorney and further held that any statements elicited in the absence of counsel is inadmissible, even where the statement is voluntarily given. It would thus seem that the New Jersey Supreme Court has placed itself in an anomalous position applying different standards of waiver depending upon the pre-indictment and the post-indictment stage.

Those Courts that have limited the application of *Escobedo* have done so by relying on the "request" feature. In contrast, those Courts that have applied *Escobedo* to the present situation, have done so by a careful examination of *Escobedo* in the context of the recent right to counsel cases. Accord *State* v. *Dufour*, 206 At. (2) 82 (R. I. 1965); *State* v. *Neely*, 239 Orc. 487, 398 P. (2) 482 (1965); *People* v. *Dorado*, 398 Pac. (2) 482 (1965).

2. Initially, it is to be observed that the issue of retroactivity was not raised before the United States District Court nor in the Court below, except by petition for rehearing. The Court below declined to pass upon the issue of retroactivity where it had been raised for the first time in this fashion. However, since the Petitioner has raised the point, we will answer it.

Gideon v. *Wainwright*, 372 U. S. 335 (1963) established that every person accused of a crime, whether State or Federal, is entitled to a lawyer at trial and it is judicially accepted that *Gideon* is entitled to retroactive effect: *Tehan* v. *Shott*, —— U. S. —— (1966); *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *United States* v. *La Vallee*, 330 F. 2d 303 (2 Cir. 1964). Following *Gideon*, this Court ruled in *Massiah* v. *United States*, 377 U. S. 201 (1964) that

in the post-indictment stage, the criminal defendant has a right to assistance of counsel. Thereafter, in *Escobedo* v. *Illinois*, 378 U. S. 478, 486 (1964) the right to assistance of counsel was extended to the pre-indictment interrogation, the Court emphasizing that "* * * It would exalt from over substance to make the right to counsel, under these circumstances, depend on whether at the time of interrogation the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." *Escobedo* extended to the pre-indictment interrogations the right established by *Gideon* to counsel at trial. Thus the doctrine enunciated in *Gideon* v. *Wainwright* relating to the assistance of counsel is extended in *Escobedo* to the time when the process shifts from the investigatory to the accusatory stage. When that stage is reached, the accused is entitled to a lawyer. Since *Gideon* has been applied retroactively and *Escobedo* is an extension in time of its principle, it follows that *Escobedo*, too. should be given retroactive effect.

As this Court said in *Gideon* v. *Wainwright*:

> "A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell* v. *Alabama*: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. * * * He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he

> faces the danger of conviction because he does not know how to establish his innocence.' 287 U. S. [45] at 68-69, 53 S. Ct. [55] at 64, 77 L. Ed. 158."

In *Escobedo* it was recognized that these same considerations were applicable at a pre-indictment interrogation. Using the same words of Justice Sutherland as *Gideon* cited, the Court said that "the 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation." It continued "This was the stage when legal aid and advice were most critical to petitioner." Therefore we submit that there can be no basis for distinguishing the two cases in terms of the retroactivity of their application.

The direct connection between *Gideon* and *Escobedo* can be seen also in the fact that both cases are based upon the Sixth Amendment provision that "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." If the Sixth Amendment guarantee is to be given retrospective effect in one decision, then it is surely unreasonable to deny that guarantee the same effect in another. The Petitioner advances the proposition that this Court should deny the constitutional right enunciated in *Escobedo* to those who happened to be tried before the decision was rendered. To accept this thesis would be to assign a lower constitutional status to pre-*Escobedo* prisoners than to pre-*Gideon* prisoners where the same constitutional amendment is involved. It would deny a right so fundamental and essential that it is made obligatory upon the States by the Fourteenth Amendment to the United States Constitution; a right that has been characterized by this Court as a "basic minimal" right vouchsafed by the Constitution. *Rideau* v. *Louisiana*, 373 U. S. 723 (1963).

In *Linkletter* v. *Walker*, 381 U. S. 618 the Court held that the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643, was not to be given retroactive effect. This Court also stated that it would apply its decision retrospectively when "the principle we applied went to the fairness of the trial—the very integrity of the fact-finding process." Since *Escobedo* extends to the pre-indictment interrogation, the time at which the right to counsel attaches, it should follow that the right is as fundamental and basic to a fair proceeding at that stage as at trial. By the Court's own criterion of fairness then, *Escobedo* should be accorded retrospective effect. Any attempt to distinguish between the right to counsel at trial (established by *Gideon*) and the right to counsel at the interrogation stage, (established by *Escobedo*) is rejected by this Court in *Escobedo*, 378 U. S. 487, 488:

> "* * * The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation: and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' In re Groban, 352 U. S. 330, 344, 1 L. Ed. 2d 376, 387, 77 S. Ct. 510 (Black, J., dissenting). 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."' Ex parte Sullivan, 107 F. Supp. 514, 517-518."

While *Gideon* and *Escobedo* were both concerned with the issue of right to counsel, *Mapp* was concerned with the entirely different problem of illegal search and seizure. *Gideon* and *Escobedo* were both based on the same

Amendment—the Sixth—while *Mapp* is based upon the Fourth. Moreover, *Mapp* v. *Ohio* was essentially a rule aimed at discouraging certain kinds of undesirable conduct by the police. That this is so is indicated by the words of the *Mapp* opinion, the nature of the Fourth Amendment guarantee which does not directly concern the judicial process, and by the historical development of the *Mapp* decision from *Wolf* v. *Colorado*, 338 U. S. 25. It involved no question of the guilt or innocence of a defendant. The *Gideon* and *Escobedo* decisions however directly concerned the validity of the process by which the accused are found guilty.

Judge Forman in his concurring opinion on the denial of the petition for rehearing in this case summarized the two critical factors which reflect the underlying policy of the Escobedo rule. 1. The assistance of counsel at the accusatory stage of the proceeding enables the accused to properly exercise his right. 2. Implementing a right to counsel at the accusatory stage assists in the difficult task of resolving the question of coercion where a confession is obtained during a closed interrogation. (Pet. App. 28a). Judge Forman further made this pertinent statement when he said "When a conviction is sought assisted by the introduction of a confession, failure to apply the *Escobedo* rule (which now enables the accused to properly exercise his rights at the accusatory stage of the proceedings maximizes the ability of the judiciary to rule on the voluntariness of a confession) has the potential to impair the fairness of a trial and to weaken the integrity of the fact-finding process."

As we have seen from the discussion of the right to counsel, the voluntariness or involuntariness of a confession is not the only standard by which the fairness or in-

tegrity of a criminal prosecution is to be measured. It is apparent however, that this Court in *Escobedo* gave great consideration to the issue. It spoke quoting *Haynes* v. *Washington*, 373 U. S. 503 (1963), of the fact that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . . and emphasized that promises contingent upon confession had been made to the accused. Thus, this Court recognized the voluntariness of *Escobedo's* confession was still at issue despite the finding of the lower court that it was voluntarily, and indicated that the question of voluntariness could not be satisfactorily settled in any case without an attorney being present. In essence then, *Escobedo* made the factor of counsel non-participation at the accusatory stage of the proceeding another independent basis for confession inadmissibility. On this ground, too, *Escobedo* should be made to apply retroactively.

This court in the very recent case of *Tehan* v. *Shott*, —— U. S. —— (1966) held that the rule enunciated in *Griffin* v. *California*, 380 U. S. 609 (1965) does not require retroactive application. One of the reasons advanced was, "By contrast, the Fifth Amendment privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society and the right of each individual to be left alone." In the very same case, this Court held, "The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding

with the clear danger of convicting the innocent. See *Gideon* v. *Wainwright,* 372 U. S. 335, *Dougherty* v. *Maxwell,* 376 U. S. 202, *Griffin* v. *Illinois,* 351 U. S. 12; *Eskridge* v. *Washington Prison Board,* 357 U. S. 214. The same can surely be said of the wrongful use of a coerced confession. See *Jackson* v. *Denno,* 378 U. S. 368; *McNerlin* v. *Denno,* 378 U. S. 575; *Reck* v. *Pate,* 367 U. S. 433."

Since this is a capital case we submit that the *Gideon-Escobedo* rule should have been applied in theory at least since *Betts* v. *Brady,* U. S. 455 (1942). The genesis of the *Gideon* Rule is found in *Powell* v. *Alabama,* 287 U. S. 45 (1932) where the Court said "he requires the guiding hand of counsel at every stage in the proceedings against him." In *Gideon* this Court said the fact is that in deciding as it did—that "appointment of counsel is not a fundamental right essential to a fair trial—the court in *Betts* v. *Brady* made an abrupt break with its own well-considered precedents and "The Court in *Betts* v. *Brady* departed from the sound wisdom upon which the Court's holding in *Powell* v. *Alabama* rested."

In any case, the effect of applying the *Escobedo* decision retroactively would not be so severe as the Petitioner contends. Prisoners would not necessarily be released, but only retried. If found guilty, they would be subject to the imposition of harsher fines and sentences than they originally received. This fact alone would probably deter many prisoners from instituting *habeas corpus* proceedings.

Paraphrasing the language of *Palumbo* v. *New Jersey,* 334 Fed. 2d 254 (1964) it is, of course, possible that some persons "who present reasonable risks of ever becoming productive citizens", would be released by giving *Escobedo* retrospective effect, however as the *Palumbo* opinion con-

inues "This unfortunate effect . . . will disappear with-
n a few years. It is, we suspect, in the nature of growing
ains of a society dedicated to establishing an ordered
ense of liberty for every individual be he indigent or not."
p. 531).

CONCLUSION

For the foregoing reasons, it is respectfully urged that his petition for a writ of certiorari should be denied.

[Cross Petition Follows]

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent and cross petitioner, Anthony Russo, prays that a writ of *certiorari* issue to review the decision of the Court below holding that Respondent's confession was not coerced in violation of the Fourteenth Amendment. The writ to issue only in the event this Court should grant the petition for a writ of *certiorari* in No. 834 in this term.

Opinions Below

The opinions of the United States Court of Appeals for the Third Circuit, printed in the Appendix, pp. 1a to 30a are reported in 351 F. 2d 429 (3 Cir., 1965).

The United States Court of Appeals for the Third Circuit entered judgment in this case on May 20, 1965. The State of New Jersey filed a petition for rehearing, which petition was denied on October 13, 1965.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question Presented on Cross-Petition

Is due process of law denied to a defendant by the admission into evidence of a confession obtained under circumstances whose totality presents a picture of overbearing defendant's free will?

Constitutional Provisions and Rules Involved

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Rules of Criminal Practice

Rule 3:2-3. Proceedings before the Magistrate

(a) Appearance. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith.

(b) Preliminary Hearing. The magistrate shall inform the defendant of the complaint against him and if a copy of the complaint has not previously been furnished to the defendant, he shall be supplied with a copy thereof. The magistrate shall also inform the defendant of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. If the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waivers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket.

(c) Preliminary Examination. If the defendant does not waive indictment and trial by jury but does waive preliminary examination, the magistrate shall forthwith bind him over to await final determination of the cause. If the defendant does not waive examination, the magistrate shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him. If, from the evidence, it appears to the magistrate that there is probable cause to believe that an offense has been committed and the defendant has committed it, the magistrate shall forthwith bind him over to await final determination of the cause, otherwise, the magistrate shall discharge him; provided, however, that a magistrate shall not discharge the defendant without first giving the county prosecutor notice and an opportunity to be heard. Such notice may be oral, or may be in writing, and shall state when the county prosecu-

tor may appear and be heard. An entry shall be made on the docket as to when and how such notice was given. The magistrate shall admit the defendant bail as provided by these rules. After concluding the proceeding the magistrate shall transmit, forthwith, to the county prosecutor all papers in the cause in the event the defendant is not discharged; provided, however, that when the county prosecutor so requests the magistrate shall forward the papers to him even though the defendant is discharged. Any bail taken by him shall be transmitted to the county clerk.

Statement of the Case

In Cross-Petitioner's answering brief, the statement of facts is set forth therein and Cross-Petitioner makes them a part hereof.

Reasons for Granting the Writ

On the issue of voluntariness, the Court below found Russo's confession voluntary. Under the circumstances of this case, we submit that this holding is in conflict with previously rendered decisions of this Court. In its opinion the Court below after describing the police activities while Russo was confined to the hospital said "Interrogation of Russo under the circumstances seems repugnant to concepts of fairness". (Pet. App. 9)

Any questioning by police officers which in fact produces a confession which is not the product of a free intellect is inadmissible. *Townsend* v. *Sain*, 372 U. S. 293 (1962). If an individual's "will was overborne" or if his confession was not the product of a rational intellect and free will "his confession is inadmissible because coerced". *Reck* v.

Pate, 367 U. S. 433 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199, 208. The question in each case is whether the defendant's will was overcome at the time he confessed. The use in a State criminal trial of a defendant's confession, obtained by coercion, whether physical or mental is forbidden by the 14th Amendment. *Leyra* v. *Denno*, 347 U. S. 556.

Comparison of the facts in the case at bar with the facts of some leading coerced confession cases compels the conclusion that the Cross-Petitioner's inculpatory statements were neither in fact nor in law the product of a free intellect. The undisputed facts revealed that the Cross-Petitioner was subjected to a combination of coercive forces as overwhelming as any involved in recent coerced confession cases, in which convictions of state prisoners have been set aside in the United States Supreme Court. Indeed, the undisputed facts in this case show a totality of circumstances even more compelling than the circumstances present in a number of leading cases. The following comparison of the significant undisputed facts of this case with the facts of some of the leading cases in which confessions have been held involuntary is offered for the purpose of substantiating these assertions.

Protracted police questioning of an accused while he is held incommunicado and without being advised of his constitutional rights is highly significant to the constitutional conclusion in a coerced confession case. Such interrogation has been held to be inherently coercive. E.g., *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); also *Callegos* v. *Colorado*, 370 U. S. 49, 51 (1962). Detention of an accused in the complete and exclusive control of the police "breeds coerced confession" and is root of the evil. *Watts* v. *Indiana*, 338 U. S. 49, 57 (1949).

In *Ashcraft* v. *Tennessee, supra,* the interrogation lasted for 36 hours, somewhat longer than the interrogation here, but the witness was a mature man of intelligence and standing in the community. He apparently was in good health. In the case at bar, the questioning of the Cross-Petitioner began on March 17, 1961, while he was in the hospital certain admissions were obtained from him. At that particular time surgery had just been completed. Upon his discharge from the hospital he was immediately taken to the Newark Police Headquarters at 11:00 A.M., questioned and the signing of the confession was completed at 4:05 P.M. The physical state of the accused is, of course, a relevant factor on the issue of voluntariness. See *Colombe* v. *Connecticut,* 367 U. S. 568, 602 (1961); *Reck* v. *Pate,* 367 U. S. 433, 441-43 (1961).

Other decisions have found confessions to be involuntary even when derived from much shorter periods of interrogation than those involved in the *Ashcraft* case. In *Malinski* v. *New York,* 324 U. S. 401 (1945), the accused was arrested at 8:00 A.M.; he confessed at 6:00 P.M. although he was not questioned constantly and was allowed to have private conversation with a friend. Cross-Petitioner, on the other hand, did not speak to any friendly person until after the police had extracted the last of his inculpatory statement on March 24, 1961. In fact, he was held incommunicado for nine days under police guard at the Martland Medical Center. During that period of time police did not advise him of his constitutional rights nor was he told that he had the right to refuse to make a statement; nor was he told that any statement that he might make could be used against him and was not told of his right to be represented by counsel.

In *Spano* v. *New York,* 360 U. S. 315, the accused surrendered to the authorities at 7:00 P.M. and the last of

of his incriminating statements was made at 6:00 A.M. the next morning, after nine hours of actual questioning. He had not been allowed to consult with his attorney but presumably was aware of his right to one and specifically had been advised to remain silent, as Russo had not been. Spano had a history of emotional instability, but Russo was also maladjusted and a few years younger. The sum of these facts surely have as much constitutional significance as the denial of Spano's request to see his previously retained attorney. *Escobedo* v. *Illinois,* 378 U. S. 478 (1964).

In *Culombe* v. *Connecticut,* 367 U. S. 568 (1961), the accused was apprehended on Saturday and did not confess until the following Wednesday, but the most extended session of questioning prior to the first confession ran only three and one half hours and included substantial respites. He received ample food and sleep; there was no claim of physical brutality. Throughout his detention the accused displayed a cooperative attitude between his interrogations. Moreover, Culombe, although of low intelligence was 33 years old and in good health. It could hardly be presumed that he was more suggestible or susceptible to intimidation than was Cross-Petitioner, who at the time of his ordeal with the police was only 21 years of age, had a history of emotional disturbance and was weakened by the lingering effects of his surgery.

In *Haley* v. *Ohio,* 332 U. S. 596 (1948), a 15 year old boy confessed after five hours questioning, when confronted with false confession made by alleged accomplices. He was not advised of his right to counsel and to remain silent until the signing of the confession. Though Russo was six years older he was interrogated at the hospital and thereafter at the police headquarters from 11:00 A.M. until 4:05 P.M., he likewise was not advised of his rights. The

Supreme Court found that Haley's confession should have been excluded and we submit that this conclusion logically extends to Russo as well.

In *Haynes* v. *Washington,* 373 U. S. 503 (1963), there was no claim of physical abuse, deprivation of food or rest, or uninterrupted long periods of questioning. The accused was a mature individual who had a record of previous contacts with the police. Haynes confessed his crime once to the arresting officers on the way to the police station, again after ½ hour of questioning that evening, and again during 1½ hours of questioning the next morning. The last confession was signed that afternoon, 16 hours after arrest and admitted into evidence. This confession was held to have been coerced through the combination of a threat of continued detention and the promise that defendant could see his family if he confessed. This pressure falls far short of that to which Russo was subjected for a longer period of time and with a lesser ability to resist, considering his emotional instability and physical pain resulting from surgery.

Also of high significance to the constitutional conclusion that the confession is coerced is the attitude of the police as revealed by certain objective facts. The attitude is noteworthy because it bears on what really happened during the secret interrogations, a subject of inevitable dispute, between the accused and the police. In *Haley* v. *Ohio, supra,* the accused, a 15 year old boy, confessed to participation in a murder after five hours of questioning. Although a newspaper photographer was allowed to see him and to take his picture, as soon as he confessed neither his mother nor his lawyer was allowed to see him until several days later. The Court pointed out that these facts showed a callous police attitude of their methods in extracting the confession. Id. at 600. The same source of callous police attitude

is revealed in this case by a host of undisputed facts such as the persistent questioning by Cross-Petitioner, first at the hospital and thereafter at police headquarters, by the failure at any time during his period of hospitalization and at the interrogation to advise him of his right to counsel; by the failure to inform him of his right to remain silent and by the long delay in bringing Cross-Petitioner before a Magistrate, a delay which persisted even after he had made the alleged confession.

What was said by the United States Court of Appeals for the Second Circuit in *U. S. ex rel. Wade* v. *Jackson,* 256 F. 2d 7, 16, Cert. Den. 357 U. S. 908 (1958), is equally appropriate to this case:

> "When law enforcement officials create a situation where those in custody have no means of communicating with the outside world and no way of calling their plight to the attention of any disinterested persons for as long as 23 hours, common sense requires that we conclude that the observance of the constitutional rights of their prisoners was secondary to obtaining incriminating statements from those so isolated. Such methods are inherently coercive."

Delay in arraignment, aside from its bearing on the attitude of the police, has been considered a significant factor in the totality of circumstances which must be considered in determining whether a confession is involuntary. *Payne* v. *Arkansas,* 364 U. S. 560, 563 (1958); *Fikes* v. *Alabama,* 352 U. S. 191, 199 (1957); *Watts* v. *Indiana,* 338 U. S. 49, 56-57 (1949). Here, in this case, for 9 days while Cross-Petitioner was hospitalized there was no arraignment. The confession was obtained on March 24, 1961. The arraignment and preliminary hearing scheduled for March 28, 1961

were adjourned without explanation on the record herein until April 4, 1961. In the interim, on March 30, 1961 the Cross-Petitioner was indicted.

It is submitted that the true rule as stated in *Culombe* v. *Connecticut*, 367 U. S. 568, 581-582, applies herein:

> "Its essence is the requirement that the State which proposes to convict and punish an individual produce evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

CONCLUSION

For the foregoing reasons, it is respectfully urged that in the event the Court shall grant a petition for writ of certiorari in No. 834, this petition for writ of certiorari should likewise be granted.

Respectfully submitted,

RAYMOND A. BROWN,
IRVING I. VOGELMAN,
Attorneys for Cross-Petitioner,
Anthony Russo.